IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 508

ANDRES LUCAS and ARCHIE L. LISCO, individually and as citizens of the State of Colorado, taxpayers and electors therein, for themselves and for all other persons similarly situated,

Appellants,

vs.

THE FORTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF COLORADO, JOHN LOVE AS GOVERNOR OF THE STATE OF COLORADO, HOMER BEDFORD AS TREASURER OF THE STATE OF COLORADO, AND BYRON ANDERSON AS SECRETARY OF STATE OF THE STATE OF COLORADO, EDWIN C. JOHNSON, JOHN C. VIVIAN, JOSEPH F. LITTLE, WARWICK DOWNING and WILBUR M. ALTER,

Appellees.

BRIEF OF APPELLEE - DEFENDANTS

DUKE W. DUNBAR
Attorney General
State of Colorado

ANTHONY F. ZARLENGO
Special Assist. Atty. General
State of Colorado

Attorneys for Appellee-Defendants

TATLOCK'S, INC., 1614 Court Place, Denver, Colorado — Phone 266-1681

INDEX

CITATIONS

OTHER AUTHORITIES

MISCELLANEOUS

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 508

ANDRES LUCAS and ARCHIE L. LISCO, individually and as citizens of the State of Colorado, taxpayers and electors therein, for themselves and for all other persons similarly situated,

Appellants,

vs.

THE FORTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF COLORADO, JOHN LOVE AS GOVERNOR OF THE STATE OF COLORADO, HOMER BEDFORD AS TREASURER OF THE STATE OF COLORADO, AND BYRON ANDERSON AS SECRETARY OF STATE OF THE STATE OF COLORADO, EDWIN C. JOHNSON, JOHN C. VIVIAN, JOSEPH F. LITTLE, WARWICK DOWNING and WILBUR M. ALTER,

Appellees.

BRIEF OF APPELLEE - DEFENDANTS

The Parties

Appellants herein, Lucas and Lisco, are citizens and residents of the State of Colorado, residing in the counties of Adams and Denver thereof, respectively. They were among the original plaintiffs in the two actions filed and consolidated for hearing below, numbered 7501 and 7637.

Appellees, The Forty-Fourth General Assembly; John Love, Governor; Homer Bedford, Treasurer; and Byron Anderson, Secretary of State, are the successors in office of those named originally as defendants in the two actions below, and for whom the instant brief is filed.

Appellees, Edwin C. Johnson, John C. Vivian, Joseph F. Little, Warwick Downing and Wilbur M. Alter were, in the course of the proceedings below, permitted to Intervene by virtue of their interest in and support of an Initiated Constitutional Amendment then pending before the People, since adopted, and the validity of which is before this Court for determination.

OPINIONS BELOW

The opinion of the Three Judge Court, United States District Court for the District of Colorado, is reported at 219 F. Supp. 922. The majority opinion authored by Circuit Judge Breitenstein is set forth in full at page 235 et seq. of the Appendix to the briefs of all Appellees.[1]

An earlier decision of the court is reported at 208 F. Supp. 471.

JURISDICTION

The judgment and order was entered below on July 16, 1963. Notice of Appeal was filed August 1, 1963. Probable jurisdiction was thereafter noted, and on January 6, 1964 the Court dispensed with the printing of the record and provided for the filing of briefs and oral argument.

[1] Hereinafter referred to as Appendix.

QUESTION PRESENTED

Whether the people of the State of Colorado, in the exercise of their sovereign function of selecting a form of state legislative government to insure representation of the whole, are prohibited by the Constitution of the United States from apportioning the two houses of their legislature one solely upon population and the other upon a reasonable basis determined by relevant factors in addition to population.

CONSTITUTIONAL PROVISION INVOLVED

Article V, sections 45, 46 and 47 of the Constitution of the State of Colorado, as amended 1962, commonly referred to, collectively, as Amendment 7. The Amendment is set forth in full commencing at page 257 of the Appendix.

STATEMENT OF THE CASE

(a) *The pleadings and pre-trial proceedings.*

The consolidated action was commenced by the filing of an original complaint numbered 7501 on March 28, 1962, and an original complaint numbered 7637 on July 9, 1962. Both then challenged the existing apportionment of the state legislature of Colorado, by Constitution called the General Assembly. Issue was joined thereon by the filing of answers denying unconstitutional discriminations.

The matter duly came on for hearing, and on August 10, 1962, the lower court issued a *per curiam* opinion holding that the population statistics presented made out a

prima facie case, but by reason of pending Constitutional amendments to be voted on by the people in the ensuing November elections, continued the matter until after November 15, 1962 for further trial on the merits. *Lisco v. McNichols*, 208 F. Supp. 471.

Following adoption by the people of the Amendment here in question supplemental complaints were filed in both actions challenging the constitutionality of that Amendment. The issue was further joined by the answers of the defendants and Intervenors and the consolidated causes came on for pre-trial hearing February 13, 1963. At that hearing the Court stated the one focal question to be whether the apportionment "is valid under the provisions of the 14th Amendment requiring equal protection." (Appendix, pg. 3)

(b) *Brief Outline of the Evidence.*

Colorado's original constitution provided that its legislative department, the General Assembly, bicameral in nature, was to be made up of a House and a Senate being comprised of 26 and 49 members respectively. Art. V, § 46. The original senatorial and representative districts were also set forth in that Article, sections 48 and 49. Both houses were to be apportioned through the use of a ratio system, i.e., allowing a senator and representative for the first specified thousands of population and an additional senator and representative for each increased specified thousands of people. There have been since statehood nine reapportionments under this system. (Appendix, pg. 61)

The system prevailed until 1962 when the instant

Amendment 7 was initiated by the people and subsequently adopted by them pursuant to Article V, § 1 of the Constitution which reserved unto the people the powers of the initiative and referendum. The number of senators and representatives remained at 100, 35 and 65 respectively from 1891 until 1962.

Amendment 7 was described by the court below.

> " Amendment No. 7 created a General Assembly composed of a Senate of 39 members and a House of Representatives of 65 members. The state is divided into 65 representative districts 'which shall be as nearly equal in population as may be' with one representative to be elected from each district. The state is also divided into 39 senatorial districts, 14 of which include more than one county. In counties apportioned more than one senator, senatorial districts are provided which 'shall be as nearly equal in population as may be.' Mandatory provisions require the revision of representative districts and of senatorial districts within counties apportioned more than one senator after each Federal Census." (219 F. Supp. at 925)

Also at the general election of 1962 was presented another initiated amendment, commonly referred to as Amendment 8. This measure was also described below.

> " The defeated Amendment No. 8 proposed a three-man commission to apportion the legislature periodically. The commission was to have the duty of delineating, revising and adjusting senatorial and representative districts. Its actions were to be reviewed by the Colorado Supreme Court. The districting was

to be on a strict population ratio for both the Senate and the House with limited permissible variations therefrom." (219 F. Supp. at 925)

The people adopted Amendment 7 by a vote of 305,700 for, to 172,725 against. The measure carried in every county of Colorado. Amendment 8 was rejected by a vote of 149,822 for, to 311,749 against. It was rejected in every county of Colorado. (See Exhibit C, Appendix, pg. 229)

The state is divided into four economic regions. See Exhibit D, *Economic Analysis of State Senatorial Districts in Colorado,* Denver Research Institute, University of Denver.[2] These regions are: (1) western, embracing those counties lying generally west of the continental divide or on the front range of the mountains; (2) eastern, comprising, generally, the plains counties; (3) south central, embracing the counties drained by the Rio Grande, together with Las Animas and Huerfano; and (4) the east slope, that tier of counties to the east of the mountains running, generally, from Larimer and Weld on the north to Pueblo on the south.

The unifying economic characteristics of the Western Region are the basic industries of mining, agriculture (principally livestock growing), tourism and recreation. Approximately two-thirds of its population is rural, i.e., living in communities of less than 2,500 inhabitants or on farms. Accessibility by reason of the widely spread mountainous areas is of paramount importance in determining economic and social relationships in the area.

The Eastern Region forms a part of the Great Plains.

[2]Exhibit D, hereinafter cited D.R.I., is submitted to the court in original form.

The entire region is dominated by agriculture, principally dry farming, with winter wheat the main crop. Accessibility in the area presents no problem, there being in addition to the highways permitting year around travel, at least one railroad through each county.

There is marked economical distress in the South Central Region. There has been a steady population decrease surpassed by declining employment opportunities. Agriculture is the region's most important industry, with the relative importance of mining on the decline by reason of diminishing use of coal. The area is heavily populated by those with Spanish surnames.

The major factor distinguishing the East Slope Region from the other three is rapid growth in population, employment and economic activity. The population is highly urbanized — to the extent of 86.7 percent. Employment has risen 34 percent in the past decade. In addition to manufacturing and heavy industry, services and trade, both retail and wholesale, are of great economic importance in the region.

The population of the state (1960) divided by these four regions is as follows:

East Slope	1,317,519
Western	227,841
Eastern	142,033
South Central	66,554
	1,753,947

From these regions are carved the senatorial districts. In the East Slope all senatorial districts embrace one

county each, and to each are allotted from one to eight senators under Amendment 7. The total representation in the Senate from this region is 23.

The Western Region, with the exception of Mesa county, is comprised of multiple county districts and has a total of 8 senators. The Eastern Region is made up of five multiple county districts and has a total of 5 senators. The South Central Region is made up of three districts with one senator each.

The senatorial districts within the four regions are described in detail in the D.R.I. study. The districts have in themselves unifying characteristics and, as compared to others, have certain distinguishing characteristics. An outline of these features, supported by the Denver Research study, appears in this brief as Appendix A.

Pursuant to the mandate of Amendment 7 the legislature did by House Bill No. 65, commonly referred to as the Lamb Bill, Session Laws, 1963, pg. 520, reapportion the House on a *per capita* basis. While the validity of this legislation is not before the Court, the fact is that it was accomplished.

The result of the apportionment under Amendment 7 is shown by all the evidence to secure representation to all the people. Nevertheless in terms of numbers it leaves control of the legislature in the majority, i.e., the populace of the metropolitan areas. The development of these matters is best left for argument hereinafter and their inclusion at this juncture would result only in undue repetition and argument where argument, as we see it, does not belong.

(c) *The Opinion and Decision Below.*

Upon consideration of all the evidence the decision entered below, Circuit Judge Breitenstein authoring the opinion and Chief District Judge Arraj concurring. A dissenting opinion was filed by District Judge Doyle.

The decision of the Court was that the apportionment effected by Amendment 7 was not in anywise violative of the Equal Protection Clause of the Fourteenth Amendment. In reaching this conclusion the court recognized that the state is neither an economically or geographically homogenous unit; that one House of the legislature is apportioned *per capita;* that the peoples living within the four economic regions have interests unifying themselves and differing from those in the other regions; that in forming the senatorial districts geographical divisions, accessibility, homogeneity and population have been recognized; that the people of the state overwhelmingly chose the present plan of apportionment, and overwhelmingly rejected a *per capita* method of apportionment, and that by no method of senatorial districting other than that chosen by the people would the minorities be afforded representation.

The evidence, we submit, supports the reasoning, and the reasoning demands the conclusion reached.

SUMMARY OF THE ARGUMENT

I.

The one issue now to be resolved by this Court is whether as determined below, the people of the State of Colorado acted within the confines of the Equal Protection Clause of the Fourteenth Amendment in initiating and adopting a Constitutional Amendment apportioning their bicameral legislature one house strictly *per capita* and the other upon a reasonable basis determined by relevant factors in addition to population.

The determination of that question does not depend upon any conclusion which might be reached in the state legislature apportionment cases now pending before this Court. In none of them is presented the issue here involved wherein one house of a legislature is apportioned strictly *per capita*, and where the plan of apportionment came about through the overwhelming mandate of the people in the exercise of the Initiative, a power reserved unto them by the Constitution.

The question presented is not determined by the decesions of this Court in *Gray v. Sanders*, 372 U.S. 368 and *Wesberry v. Sanders*, No. 22, This Term. The Justices in *Gray* carefully pointed out that it is not to be considered determinative of state legislative reapportionment cases, and *Wesberry* was determined by history applicable to a constitutional provision not here involved.

Two other matters should at the outset be disposed of as being beside the one point involved: The validity of the legislation implementing Amendment 7, which has never been considered, and *Lisco v. McNichols*, 208 F.

Supp. 471, decided below prior to the adoption of Amendment 7.

II.

The Equal Protection Clause of the Fourteenth Amendment does not require a *per capita* apportionment in both houses of a state bicameral legislature.

It was said in *Baker v. Carr*, 369 U.S. 186, 226 that the well developed and familiar standards of Equal Protection do apply — and those standards do not require universal equality. Moreover, the consensus of the state and lower federal court decisions is that practical equality is not required.

Finally there is no historical basis upon which a *per capita* theory could rest. The Founding Fathers, whatever analogy there may be between the governments of the various states and of the United States, determined that the application of the theory was not essential to the government of the United States, and the history of state governments at the time and subsequent to the adoption of the Fourteenth Amendment clearly evince that Equal Protection of the Laws was not meant to require *per capita* apportionment of state legislatures.

III.

The plan of apportionment initiated and overwhelmingly adopted by the people of Colorado meet the well defined and familiar standards of Equal Protection. Those standards or tests were succinctly stated by Justice Brandeis in his opinion to *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406. Applied to the question at bar, they are:

First: The object of Amendment 7 accomplishes a purpose and promotes a policy within the permissible function of the state.

The permissible function involved here is a bicameral legislative department. The objects and purposes of bicameralism are two-fold, one, to effect a check and balance in the legislature, and two, to secure a representation therein of all the peoples, i.e., the whole, and not merely the majority.

Amendment 7 does accomplish these purposes. Clearly it retains a check and balance. It also provides a representation of the whole, for by the apportionment method of the Senate minority peoples and their interests are given a voice in the legislature. As determined by the court below, that minority under a strict *per capita* system in both houses would be in fact overwhelmed.

Second: The apportionment plan of Amendment 7 bears a substantial relation to the object sought.

In consideration of the first test it becomes clear that the Colorado apportionment plan serves to give the minority peoples and interests a voice in the legislature.

Yet it is equally clear that this object is not perverted by giving to the minorities the control of the legislature. The terms "majority" and "minority" when applied to the question of reapportionment, and as applied by those who challenge Amendment 7, mean those living in the metropolitan areas and those living in the rural areas, respectively. It is not just a simple question of residence, i.e., of metropolitan peoples vs rural peoples. Obviously those living in the two areas have vastly different prob-

lems to be considered in the legislature, and the differences between them exist accordingly.

The apportionment plan of Amendment 7 leaves the majority vote in the legislature in the highly populated, metropolitan areas.

There is no "perpetual veto" or "perpetual discrimination" as there is in fact no veto or discrimination,, and by reason of the Initiative, there is no perpetual form of legislative government.

Third: The apportionment plan of Amendment 7 treats alike those similar in fact.

There is under Amendment 7 a complete lack of a "crazy-quilt" apportionment, or otherwise stated, there is a definite, continuing policy.

A consideration of the apportionment plan unquestionably shows that those living in the rural areas, with interests connected with agriculture, mining and the like, are not discriminated against by others similarly situate, and in like fashion, are those in the heavily populated areas treated alike.

ARGUMENT

I.

The one issue now before the Court cannot be resolved by decision in the pending state legislative reapportionment cases from Virginia, Alabama, Maryland, Delaware and New York, nor are the decisions of this Court in Gray v. Sanders and Wesberry v. Sanders dispositive of the issue presented.

We believe it would be well to state what in our view is the one question now before this Court; and to emphasize that which is before the Court may be best accomplished by disposing at the outset of that which is not.

The question to be determined may be simply put: Are the people of the State of Colorado, in the exercise of their sovereign function of selecting a form of state legislative government to insure representation of the whole, prohibited by the Constitution of the United States from apportioning the two houses of their legislature one solely upon population and the other upon a reasonable basis determined by relevant factors in addition to population?

The answer to the question, which we would respectfully submit to be self evident, does not require either that a position be taken on other state apportionment cases now pending before the Court or that a sophisticated argument be made distinguishing the two Georgia decisions rendered since *Baker vs. Carr*, 369 U.S. 186.

(a) *The questions before this Court presented by the apportionments of Virginia, Alabama, Maryland, Delaware and New York.*

We are, of course, indebted to those who have appeared in the cases now pending for the collective presentation of basic principle. Because of their efforts much which could ordinarily and of necessity be required herein would only be repetitious. The factual premise upon which basic principle must operate in each of those matters, however, clearly renders each inapposite to the case at bar.

The apportionment questions presented by *Davis v. Mann*, Oct. Term 1963, No. 69, 213 F. Supp. 577; *Reynolds v. Sims*, Oct. Term 1963, Nos. 23, 27, 41, 208 F. Supp. 431; *Maryland Committee for Fair Representation v. Tawes*, Act. Term 1963, No. 29, 184 A.2d 715; *Roman v. Sincock*, Oct. Term 1963, No. 307, 215 F. Supp. 169; and *W.M.C.A. v. Simon*, Oct. Term 1963, No. 20, 208 F. Supp. 368, all involve situations wherein considerable differences in representation on a pure population basis exist in both houses of the state legislatures. In Colorado the House by Amendment 7 is apportioned strictly *per capita*.

Also, a principal distinction between the case at bar and the remaining cases pending is that in Colorado, as has heretofore been pointed up, the present plan of apportionment was initiated and adopted by an overwhelming vote of the people, the same receiving an affirmative plurality in every single one of Colorado's sixty-three counties.

We make plain that reference to the foregoing is not and should not be taken to mean that unconstitutionality

of the apportionment laws in these other cases must inevitably follow. Full consideration must of course be given to whether or not the Fourteenth Amendment requires their justification and, if so, whether there are or are not present in each instance factors of justification.

Nor should the recital be taken as an expression of opinion that the Fourteenth Amendment requires a *per capita* apportionment in *one* house of a bicameral legislature.

There are of course other and quite substantial existent differences. Those differences need not be pointed up in detail at this juncture for, in discussing hereafter Colorado's history, its peoples, its economy, its geography and other characteristics, solely peculiar to it, the differences will become evident.

(b) *Gray v. Sanders and Wesberry v. Sanders.*

We would further submit that *Gray v. Sanders,* 372 U.S. 368 and *Wesberry v. Sanders,* No. 22, Oct. Term 1963, are of no greater import to the resolution of the instant cause. We take the words of the Justices in *Gray* to mean precisely what they say.

Justice Douglas for the majority:

"This case, unlike Baker v. Carr, 369 U.S. 186, 7 L. Ed. 2d 663, 82 S.Ct. 691, supra, does not involve a question of the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State Legislature in designing the geographical districts from which representatives are chosen either for the State Legislature or for the Federal House of Representatives." (372 U.S. at 376)

Justice Stewart, with whom joined Justice Clark, concurring:

"This case does not involve the validity of a state's apportionment of geographic constituencies from which representatives to the State's legislative assembly are chosen, *nor any of the problems under the Equal Protection Clause which such litigation would present.* We do not deal here with 'the basic ground rules implementing Baker v. Carr.'" (372 U.S. at 381-382)

Apart from the carefully described limitations of *Gray*, its inapplicability is patent. We do not deal here with provisions rendering unto each of the Colorado voters resident in Hinsdale, Huerfano or Baca counties two, four or six votes for one seeking to become Governor while their fellow citizens happening to reside in Jefferson or Arapahoe county may cast for their gubernatorial choice only one.

And if we read *Wesberry v. Sanders* correctly its holding flows from the intent of those framing Art. I, § 2 of the Constitution that it should mean "one man's vote in a congressional election is worth as much as another's." Explicitly noted was that the questions of Due Process, Equal Protection and Privileges and Immunities arising under the Fourteenth Amendment were neither considered nor determined.

We do not perceive that the Framers' intentions of 1787 with respect to that Article which wrote the *Great Compromise* into the Constitution can be equated with the intentions of their successors promulgating nearly a century later the Equal Protection Clause.

(c) *The Lamb Bill, legislative implementation of Amendment 7.*

At this juncture it might also be well to point up that it is Amendment 7 which is involved here and no question arises with respect to the implementing legislation.

It will be noted that Section 46, Article V of the Constitution, as now amended, provides that the state shall be divided into 65 representative districts "which shall be as nearly equal in population as may be"; Section 47 provides that the State "shall be divided into 39 senatorial districts. * * * Within a county to which there is apportioned more than one senator, senatorial districts shall be as nearly equal in population as may be."

House Bill No. 65, Forty Fourth General Assembly, Session Laws 1963, pg. 520, commonly referred to as the Lamb Bill, divided the state into House and Senate districts as provided by the Constitutional Amendment.

The validity of this legislation has never been considered or challenged in these proceedings. The court below stated "No question is raised concerning the implementing legislation." (219 F. Supp. at 925)

We do not understand that Appellants before this Court challenge this legislation in any regard. The results expressed in terms of population are reflected in Appendix B, pg. 75 et seq. to Appellant's brief and examination of the data evidences only the legislature's good faith in carrying out the people's mandate.

(d) *Lisco v. McNichols*, 208 *F. Supp.* 471.

Finally in this regard we would put to rest all that is or may be claimed by virtue of *Lisco v. McNichols*, 208 F. Supp. 471. That decision, wherein the court below found

a *prima facie* case of invidious discrimination, was rendered prior to the passage of Amendment 7. It was premised upon statistical data showing, in certain cases, extreme disproportion. For example, it was found one representative district had some 7,000 people represented by a single House member as contrasted to another district with two representatives for some 127,000 persons.

Surely it must be conceded by all that in determining the constitutionality of bicameral apportionment both houses must be considered and a decision of validity or invalidity reached only after consideration of the whole. Because invalidity was determined prior to the drastic reapportionment of one house the decision is now wholly without persuasive force. The court below deemed it so for reasons so obvious their statement is superfluous.

II.

The Equal Protection Clause of the Fourteenth Amendment does not require a per capita apportionment in both houses of a state bicameral legislature.

The entire argument made by Appellants, if we understand it correctly, is that the Fourteenth Amendment requires both houses of bicameral state legislatures to be apportioned strictly *per capita*, or to put it otherwise, Equal Protection of the Laws demands universal equality. The argument is patently unsound.

This Court in *Baker*, answering that justiciability is not affected by judicial abstention from political questions, stated,

"* * * Nor need the appellants, in order to succeed in

this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action." (369 U.S. at 226)

The judicial standards, well developed and familiar, are simply and cogently put by Justice Brandeis in dissent to *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406.

"* * * In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible."

To argue that state legislative apportionment compliant with Equal Protection means only *per capita* apportionment is to argue for the discard of the "well developed and familiar standards"; it is to argue that the standard is rather "universal equality", an assertion Justice Douglas concurring in *Baker* emphatically denied. (369 U.S. at 244-245) Moreover it has been observed with clarity unusual to the complexities of the issue that

if complete or primary emphasis is placed upon universal equality of representation the reasoning must be found in the Guaranty Clause, not in Equal Protection of the Laws. See Israel, *The Future of Baker v. Carr*, Mich. L.R. 61: 107. In *Baker*, however, it was again affirmed that the issue of republican form of government was one without the judicial ambit.

In promulgating the standards of Equal Protection the decisions of this Court lend no aid to the proposition of strict *per capita* apportionment of state legislatures. Where or what else may be turned to for support? Certainly the consensus of the lower courts gives no aid. As stated by Judge Breitenstein below,

> "A heavy majority of the state and lower federal courts has declined to accept the 'practical equality standard' as a requirement inherent in the Equal Protection Clause." (219 F. Supp. at 927)

The many decisions supporting the statement are collected by the Circuit Judge in his note thereto.

Of equal certainty is the absence of historical support. The comments of the Founding Fathers are set forth at great length in the briefs and appendices thereto in *Maryland Committee for Fair Representation v. Tawes*, supra. While we are unable to precisely determine any overriding value in the philosophy of those who lived and died long before adoption of the Fourteenth Amendment, nevertheless nothing in anywise indicates a consensus there on the necessities and values of a legislative body chosen strictly *per capita*. As a matter of fact, and apart from the presence or lack of analogy to state government, the Founding Fathers determined in the un-

doubted exercise of good conscience and sincere belief in exemplary and lasting republican government that *per capita* apportionment of the entire legislative branch was not necessary.

Justice Frankfurter's opinion in *Baker*, 369 U.S., 311-317, points up the apportionment of the legislatures in the various states at the time the Fourteenth Amendment was ratified, and further the legislative apportionment in the states admitted thereafter and under its mandate. The statement there made cannot be improved upon and need not be repeated; suffice it to say that no comfort for the exponents of pure *per capita* can be derived from this history.

III.

The plan of apportionment initiated and overwhelmingly adopted by the people of Colorado meets the well defined and familiar standards of Equal Protection of the Laws.

Notwithstanding the fact that the case of those seeking this review, as stated by them, must fall with the ill-conceived notion of strict *per capita* apportionment, it nevertheless is necessary to set forth that which, as applied to the apportionment of the Colorado General Assembly, falls within the allowances of Equal Protection of the Laws. It is unnecessary and would be inappropriate to go beyond that which is here actually involved.

To determine that which is allowable we return to the "well defined and familiar" standards of Equal Protection succinctly stated by Justice Brandeis.

First: The object of Amendment 7 accomplishes a purpose and promotes a policy within the permissible function of a state.

The permissible function of government involved is a bicameral legislature. Bicameralism has always been and will, we suppose, long remain the most prevalent of our state legislative systems. It was, as has been frequently pointed up to the Court, the legislative form chosen by nearly all states and retained by all with the exception of Nebraska. No one would or could seriously maintain that bicameralism is rendered impermissible by the Equal Protection Clause.

Bicameralism has, in Colorado and undoubtedly elsewhere, two principal objects or purposes: one, to effect a check and balance, and two, to insure the representation of the whole rather than only the majority.

This form of legislative government was written into the first Colorado Constitution, 1876, Article V, Section 1, providing for a General Assembly consisting of a senate and house of representatives.

The original section 46 of Article V provided,

"The senate shall consist of twenty-six and the house of representatives of forty-nine members, which number shall not be increased until the year of our Lord one thousand eight hundred and ninety, after which time the general assembly may increase the number of senators and representatives, preserving as near as may be the present proportion as to the number in each house; provided, that the aggregate number

of senators and representatives shall never exceed one hundred."

The total number was increased by Colorado Session Laws, 1891, pg. 22, to 100, 35 senators and 65 representatives. From 1891 until passage of the subject amendment the total number in the legislature and the number in each house thereof remained constant.

Section 3, Article V, unchanged since statehoood, provides that the term of Senators shall be four years[3] and the term for house members two years. Section 11, Article V provides that a majority of each house shall constitute a quorum. Section 22 of the article provides that to become law a bill shall have the vote of a majority "of all members elected to each house taken on two separate days in each house."

Thus the Framers of the State Constitution established a two-fold policy of the numerical membership of the Assembly: First, that the total number of both houses should not become unduly cumbersome. In nearly three quarters of a century the total has risen only four, from 100 to 104. It is readily apparent that a state legislature can become so large as to become unduly cumbersome causing effective debate and consideration, and hence effective legislation to become impracticable if not impossible. Cf. *W.M.C.A., Inc. v. Simon,* 208 F. Supp. 368, 379.

Second, the ratio of members of one house to the other should remain constant. From 1891 - 1962 the ratio was 5 - 9, under Amendment 7 it was slightly modified to 3 - 5.

---

[3]With the exception of one-half of those elected to the first session under the Constitution, whose term was for two years. Art. V, Sec. 5.

That the two houses were to serve as a check and balance one upon the other is of course evident in the requirement that legislation must pass the majority of both. In addition, that the two houses should be differently constituted to this end is made clear not only by the preservation of the numerical ratio one to the other, but also by the fact that the terms of office have always been of two years in the House and four in the Senate. It would be clearly inappropriate to suggest that it was ever intended that the General Assembly was to become a homogenous body made up of two houses different only in name.

It is also quite evident from the mandate of the 1876 Constitution and the ensuing practice thereunder that the General Assembly was to represent not only the majority, but the whole of the people of Colorado.

Much has been said concerning population being the historical *basis* of apportionment. The Appellants' argument runs that because population has been the basis, *per capita* apportionment is an historical truism. The argument made is devoid of merit; but from its premise, i.e., the state's historic apportionment, inescapably flows the conclusion that all the people of Colorado were to be represented in the Assembly.

The people of Colorado declared in their Bill of Rights, Article II, Constitution,

> "In order to assert our rights, acknowledge our duties, and proclaim the principles upon which our government is founded, we declare;
>
> "Section 1. All political power is vested in and derived from the people; all government, of right, origi-

nates from the people, is founded upon their will only, *and is instituted solely for the good of the whole.*"

The powers of the government therein spoken of to be instituted "solely for the good of the whole" were divided by Article III between three distinct departments, one being the legislative. We take these provisions to indisputably mean that the legislative branch, that is the General Assembly, was intended to represent the whole.

Even in the absence of such an express declaration of the people it could not be said that the function of the legislature was otherwise, for to represent the people is to represent all of the people. Stated by Chief Justice Campbell in dissent to *People v. Sours*, 31 Colo. 369, 438, 74 Pac. 167,

> "• • • No one is so rash as to deny that in this country a majority, in general, rules. But why is this so? As well said by Judge Jameson at section 568 of his valuable work on Constitutional Conventions, in the true sense of the term 'the people' means the political society considered as a unit, comprising the entire population, of all ages, sexes and conditions. • • •"

To represent the whole, and not the majority alone, the original system of apportionment was devised. Article V, Sections 48 and 49 set forth the first senatorial and representative districts. Section 47 provided for their alteration from time to time but provided also that no county shall be divided in the formation of a district and that multiple districts shall be contiguous and compact. Section 45 set forth that following the censuses the legislature "shall revise and adjust the apportionment

for senators and representatives, on the basis of such enumeration *according to ratios to be fixed by law.*"

By these ratios a senator and representative were allowed for the first specified thousands of population in the district, and a second or additional senator and representative for each specified thousands of additional persons or fraction thereof. The legislative history gleaned from the yearly Session Laws in this regard is illustrated in the following table.

SENATE

Year	Number of Persons	Additional Senator for Additional Persons	Fraction
1881	5,000	9,000	7,000
1891	8,000	20,000	15,000
1901	10,000	20,000	15,000
1933	17,000	35,000	32,000
1953	19,000	50,000	48,000
	HOUSE		
1881	1,000	5,000	3,000
1891	3,000	10,000	8,000
1901	2,000	15,000	12,000
1933	8,000	19,000	17,000
1953	8,000	22,500	22,400

Obviously the utilization of the ratio system constitutes what might be said to be an equalizer between the populous and less populous areas, in other words, insuring the less populated areas a voice in government.

The peculiarities of Colorado's topography, unequalled elsewhere in the Union, has never of course ad-

mitted or permitted of an equal distribution of population to area or of population to economic interest.

Whether or not in the utilization of this system the justifiable object of representing the whole was perverted through resulting undue representation of the non-majority is a matter not before the Court. It was presented in *Lisco v. McNichols*, 208 F. Supp. 471, and has, since the adoption of Amendment 7, passed into history.

The important fact, to be dealt with in the present context, is that the people of Colorado established a bicameral system of legislative government, a prime purpose and object of which was to secure representation of all the people. In accord therewith was Amendment 7 written into the Constitution by the people. Do then the provisions of Amendment 7 accomplish that purpose?

The House is of course put upon the basis of population, solely. It is apportioned *per capita*, and the majority rules supreme, untempered, in that body.

Through the representation in the Senate, however, the Assembly is itself made representative of the whole: For here consideration is given to the factors of economics, geography and demography peculiar to the State of Colorado, and in such consideration is found the representation of minority interests found only in sparsely populated areas.

The court below discussed the peculiarities of Colorado's topography at 928-929 of 219 F. Supp.

> "Colorado has an area of 104,247 square miles which is almost equally divided between high plains in the

east and rugged mountains in the west. It has an average altitude of 6,800 feet above sea level and some 1,500 peaks which rise to 10,000 feet or more. The Continental Divide crosses the state in a meandering line from north to south.

In the eastern half of the state are high plains crossed by two major river systems, the South Platte and the Arkansas. The western half is a mountainous area drained principally by the Rio Grande and by the Colorado River and its tributaries. Major mountain ranges lie east of the Continental Divide in some sections of the state and have foothill areas of varying breadth separating the high peaks from the high plains.

Geographically the state is divided into many regions with transportation difficulties of varying severity. The high plains are crossed from east to west by several railroads and main highways. The only north to south rail system and main highway system in this area lie just east of the foothills. The western part of the state is separated into many segments by mountain ranges and deep canyons. One main-line railroad crosses this section from east to west and none from north to south. Four principal highways provide east to west transportation by crossing the ranges at passes having altitudes of 9,000 to 12,000 feet. The north to south highways are less adequate and follow indirect routes. The terrain of the western section is such that some communities only a few miles apart on the map are many miles apart by the shortest useable road. Commercial air transportation between other than the metropolitan centers is limited.

Colorado is further divided by the availability of water supply. The state is largely semi-arid with only isolated mountain areas having an annual precipitation of over 20 inches. That part of Colorado west of the Continental Divide has 37% of the total state land area and 69% of the state's surface water yield. The part east of the Continental Divide has 63% of the land area and 31% of the surface water supplies. Conflicts over the use of water have troubled the state continuously since its admission to the Union. The growth of the metropolitan areas would have been impossible without the transmountain diversion of water from the Colorado River and its tributaries. The divisive nature of the "problem and the need for a state-wide water policy resulted in the creation of the Colorado Water Conservation Board, the members of which are chosen geographically by drainage basins. This recognition of the diverse interests of the competing areas has enabled Colorado to develop impressive irrigation and hydroelectric power projects.

The 1960 Federal Census gave Colorado a population of 1,753,947 persons. The population is concentrated heavily along the eastern edge of the foothills from Fort Collins on the north to Pueblo on the south. In this relatively narrow strip are located three Standard Metropolitan Statistical Areas as defined by the Census Bureau.

The metropolitan areas and their populations are: Denver (Adams, Arapahoe, Boulder, Denver and Jefferson Counties) — 929,383; Colorado Springs (El Paso County) — 143,742; Pueblo (Pueblo County) — 118,707."

Submitted together with the Appellees' briefs is a

document entitled *Economic Analysis of State Senatorial Districts in Colorado.* The report was prepared by the Denver Research Institute, University of Denver. The document was intended to be and remains unchallenged as an objective study to determine the distinguishing economic, socio-economic and geographical characteristics of the senatorial districts.

The court below also referred to this study in the following manner,

> "Expert research economists testifying for the defendants divided the state into four regions, Western, Eastern, South Central and East Slope. The Western Region includes those counties west of the Continental Divide and those east of the Divide and entirely within the Front Range of mountains. The area is largely mountainous with wide fluctuations in elevation, precipitation and temperature. About two-thirds of the population live in communities of less than 2,500 inhabitants or on farms. Over 65% of the area is in some form of government ownership. The major industries are agriculture (principally livestock raising), mining, and tourism.
>
> The Eastern Region is a part of the Great Plains. The area is dominated by agriculture with winter wheat the principal crop. Irrigation in the South Platte and Arkansas Valleys produces specialized crops. Livestock raising and feeding are important activities. There is some oil production.
>
> The South Central Region includes Huerfano and Las Animas Counties and the six counties drained by the Rio Grande. Agriculture (principally potato rais-

ing and livestock) and coal mining are the main industries.

The East Slope Region includes the strip of counties from Larimer and Weld on the north through Pueblo on the south. The population is highly urbanized with 86.7% living in urban areas. The economy is diversified with manufacturing, agricultural production, mining, tourism and trade and services contributing to the wealth of the area." (219 E. Supp. 929-930).

We have also included herein as Appendix A, some of the factors, taken from the study, reflecting the distinguishing features of the senatorial districts, one from the other, and in the multiple county districts, the unifying similarities.

What becomes patently clear from an examination of the Denver Research study and consideration of the geography of Colorado precluding an even distribution of population throughout, is that Amendment 7 does in fact give to all the people due representation in their State legislature.

Judge Breitenstein concluded,

"The heterogenous characteristics of Colorado justify geographic districting for the election of the members of one chamber of the legislature. In no other way may representation be afforded to insular minorities. Without such districting the metropolitan areas could theoretically, and no doubt practically, dominate both chambers of the legislature." (219 F. Supp. at 932).

The conclusion is not only supported throughout by the instant record, but is perhaps most easily illustrated by pointing up just a few examples contained in Appellants' suggested *per capita* apportionment, Appendix C, pg. 93 et seq. to their brief.

(a) Therein Pueblo is joined with Crowley and Otero. The two latter counties, represented in the Senate first as one county and then as two since 1881, would obviously no longer be represented. The population of Pueblo, highly urbanized, is shown as 118,707: the combined population of Crowley and Otero with interests in no wise similar to Pueblo, 28,106.

(b) To the same end would Elbert county with a population, 1960, of 3,708, and presently joined with Cheyenne, Kiowa, Kit Carson and Lincoln in one of the most homogenous and agriculturally dominated senatorial districts in the state, be joined with Arapahoe County, highly urbanized (91%) with a population of 127,520.

(c) Weld County, a senatorial district since 1891, the third largest Colorado county with a population of 72,344, half of which or roughly 36,000 reside in its *southwest* corner (26,000 in the city of Greeley), is to be joined with counties to the *northeast*, Logan, Sedgwick and Phillips, with a combined population of 28,984.

(d) The senatorial district of Delta, Gunnison, and Hinsdale counties would be joined with another embracing Montrose, Ouray, San Miguel and Dolores into a single member district. With even the vaguest notion of Colorado geography one could not seriously contend that a single senator could effectively and personally represent

the peoples of this area. There is virtually no movement east to west in this mountainous country. Gunnison and Hinsdale counties are topographically as far removed from San Miguel and Dolores as were they counties on the eastern slope of Colorado.

(e) Perhaps conceivably worse is the suggested joinder into a single member district of the counties embracing all of Southwestern Colorado; i.e., Districts 31 and 35 would be joined.[4] Economists placed District 31, Saguache, Mineral, Rio Grande and Conejos in the South Central Region, and District 35, San Juan, Montezuma, La Plata and Archuletta counties in the Western Region. All counties in District 31 fall within the upper Rio Grande Basin. Its boundaries to the west and north are defined by high mountain ranges. 38% of its residents are peoples with Spanish surnames. Its population is nearly 7-1 rural. (D.R.I. II-1). It is losing in population. (17% in 10 years).

On the other hand district 35 is wholly separated from district 31 topographically. It has gained population in the last ten years 25%, and its population between urban and rural is nearly equal.

(f) So also are joined all counties of northwestern Colorado into one huge single member district. We would ask how one senator could possibly represent with any effect the peoples of Moffatt, Rio Blanco, Routt, Jackson, Grand, Garfield, Eagle, Pitkin, Summit and Lake Counties. The area extends east and west from the middle

[4]It should be noted that the Senatorial district numbers are not the same in the D.R.I. study and as set forth by the court below, although the districts are, of course, the same. The court uses the numbering system of the Lamb Bill and reference herein to the districts will be in the same manner.

of the state to the western border, and again north and south from the middle of the state to the northern border. The area exceeds 20,000 square miles, and the average population per square mile of all its counties is 3. Since 1881 the whole area has comprised at least two senatorial districts. It is folly to suppose that the peoples in all areas of this vastness could speak through one senator. (Reference for the above may be made to Part II, D.R.I., particularly pages 1-4; 9-12; 18-25).

Appellants do not claim their suggested *per capita* apportionment reaches perfection. We would suppose however some thought has been given to it. The fact is the results flowing therefrom in consideration of all the peoples of Colorado would be disastrous. Whatever has passed since *MacDougall v. Green*, 335 U.S. 281, has nevertheless left undiminished the cogency of Justice Frankfurter's comment that

> "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government." (335 U.S. 283).

We would respectfully suggest that the Fourteenth Amendment does not render necessary the arithmetical transformation of sound government to the unsound. That in a word is what Appellants would have this Court do.

Second; The apportionment plan of Amendment 7 bears a substantial relation to the object sought.

The second standard under which validity is to be tested by the Equal Protection Clause has, in a large measure, been considered above. The provisions of Amendment 7 do bear a substantial relation to the objects and purposes of bicameralism.

We assume that what is implicit if not explicit in *Baker* is that population must be, under Equal Protection of the Laws, considered in the apportionment of state legislatures. Putting it another way, majorities must be considered. Hence in determining whether "differences" bear a substantial relation to the object, "differences" must mean in the apportionment sense, differences in population.

Thus while the minority and their interests are entitled to representation in the legislature, this object would be perverted were the minority permitted to override the majority, i.e., were they given effectual control of the legislature. Then the apportionment would bear no substantial relation to the object, and to employ the vernacular used, the apportionment would become invidious.

Applying the test is not completely free from difficulty for majority and minority interests are not in all cases well defined. Unquestionably at times majority interests are embraced within those of the minority and vice versa.

The theoretical difficulties however are in a large measure, if not completely, removed when consideration of the problem is placed in the context in which it arose. The whole reapportionment problem arose and is with us throughout the United States because of the growth of urban and suburban areas. The brief of Appellants makes clear throughout that what is complained of is imagined

discrimination against the populous areas in favor of the rural areas.[5]

Adopting the definitions of majority and minority interests used by Appellants and to our knowledge by all others claiming to be discriminated against in kindred causes, the unquestioned statistics of the Colorado populace renders the cry of invidious discrimination a shibboleth.

In the division of Colorado into four regions the Denver Research Institute characterized the East Slope as follows:

> "The major factor which differentiates the East Slope Region from the other three regions of Colorado

---

[5]So it is said therein, pg. 60.

> "That discrimination is, however, euphemistically worded, directed against surburban and urban centers and in favor of rural areas."

And at page 39-40,

> "If 'rural America' no longer typifies the United States, and most clearly it does not, then conversely the problems of the United States and of most of its states are primarily metropolitan problems, and those who must cope with such problems must be representative of the population, predominatly metropolitan in its locus and approach. The thesis that dominance must continue from the former great mining areas, from the cattle regions of the plains and the market town in the counties, is a thesis which, emotionally appealing though it may be to some, we respectfully submit is without maintainable constitutional foundation."

Again at page 36,

> " • • • Impetus has been given the process by the massing of population in large urban centers, by constant decrease in the importance of the rural areas of the United States in point of population, while those same areas remain politically dominant in state legislative bodies by reason of perpetuated representation out of proportion to present populations."

is rapid growth—growth in terms of population, employment, and economic activity. The population increased by 48 percent between 1950 and 1960, as compared to a net decrease for the other three regions of the state combined. The population in the East Slope Region was 1,317,519 in 1960, or 75.1 percent of the state's total. The population is also highly urbanized, with 86.1 percent of the people in the East Slope Region living in urban areas and only 13.2 percent living in rural areas (see Table 1). Population density in the East Slope Region is 88.7 persons per square mile as compared to about 5 persons per square mile in the other three economic regions." (D.R.I. I, 11-13).

The following table is illustrative.

County	1960 Population	Number of Senators Amendment 7
Larimer	53,343	1
Weld	72,344	2
Denver	493,887	8
Adams	120,296	2
Arapahoe	113,426	2
Jefferson	127,520	2
Boulder	74,254	2
El Paso	143,742	2
Pueblo	118,707	2
Total	1,317,519	23

It is readily observed that the densely populated areas of Colorado do in fact have a majority in the Senate, and of course a greater majority in the House consonant with the area's population. The area on strict *per capita* is entitled to 48 members of the total 65 in the House.[6]

Two counties, Larimer and Weld, may be taken from the totals as not by all considered part of the heavy metropolitan Denver, Pueblo and Colorado Springs areas, and a majority nevertheless remains for the metropolitan areas in the General Assembly.

Another method might be to take those counties which are, so it is said, descriminated against as the Senators therein represent a lesser number of people than the figure derived in dividing the total population by the total number of senators, i.e., 44,973.

County	Population	Number of Senators Amendment 7
Larimer	53,343	1
Denver	493,887	8
Adams	120,296	2
Arapahoe	113,426	2
Jefferson	127,520	2
El Paso	143,742	2
Pueblo	118,707	2
Mesa	50,715	1
Totals	1,221,636	20

Here again a majority exists.

[6]Under the Lamb bill, implementing Amendment 7 on **per capita**, as near as may be, the area is given 47.

Another method might be to take those districts predominantly rural.

District	Counties Included	Total Population	Number of Senators under Amendment 7
31	Conejos, Mineral, Rio Grande, Saguache	24,485	1
15-16	Weld	72,344	2
24	Chaffee, Clear Creek, Douglas, Gilpin, Park, Teller	20,909	1
27	Delta, Gunnison, Hinsdale	21,287	1
29	Grand, Jackson, Moffatt, Rio Blanco, Routt	23,426	1
32	Mesa	50,715	1
33	Dolores, Montrose, Ouray, San Miguel	25,027	1
35	Archuletta, La Plata, Montezuma, San Juan	36,727	1
37	Eagle, Garfield, Lake, Pitkin, Summit	28,249	1
28	Logan, Phillips, Sedgwick	28,294	1
34	Cheyenne, Elbert, Kiowa, Kit Carson, Lincoln	21,189	1
36	Morgan, Washington, Yuma	36,729	1
38	Crowley, Otero	28,106	1
39	Baca, Bent, Prowers	27,025	1
Totals		444,512	15

The division of the total senatorial representation in

each district by the total rural and urban population thereof also clearly envinces that the rural interests are in the minority.

District		Urban Population		Rural Population		Number of Senators Under Amendment 7
23		.536		.464		1
30		.511		.489		1
31	South Central	.138	(1.185)	.862	(1.815)	1
1-8		8.000				8
9-10		1.742		.258		2
11-12		1.518		.482		2
13-14		1.518		.482		2
15-16		.728		1.272		2
21-22		1.678		.322		2
26		.652		.348		1
19-20		1.834		.166		2
17-18	Eastern Slope	1.762	(19.432)	.238	(3.568)	2
24		.219		.781		1
25		.549		.451		1
27		.343		.657		1
29		.171		.829		1
32		.534		.466		1
33		.201		.799		1
35		.472		.528		1
37	Western Slope	.276	(2.765)	.724	(5.235)	1
28		.371		.629		1
34				1.000		1
36		.299		.701		1
38		.461		.539		1
39	Eastern	.398	(1.529)	.602	(3.471)	1
		24.911		14.089		39

Another method might be to utilize the ratio of the House to the Senate and determine the relative representation in the entire General Assembly. The ratio (39-65) is 3-5. Considering the total number in the House (65) there are therein 195 units (3 x 65). There would be a like number of units in the Senate (5 x39), or a total in the Assembly of 390. The following table illustrates the total Assembly representation of the populous areas through the employment of such a unit device.[7]

County	House Unit	Senate Unit	Total
Larimer	6	5	11
Weld	9	10	19
Boulder	9	10	19
Adams	12	10	22
Arapahoe	12	10	22
Jefferson	12	10	22
Denver	54	40	94
El Paso	15	10	25
Pueblo	12	10	22
Total	141	115	256

The populous areas are represented in the Assembly in a ratio of 256 to 390, or approximately 2/3 of the entire. Again if Weld and Larimer be removed, 30 units, there still remains 226 units out of the total of 390.

Presumably there are other methods of illustrating that shown by the foregoing. Any method used would reflect, however, that the heavily populated urban areas of Colorado have a majority in the General Assembly.

---

[7]Representation in the House is taken from the Lamb Bill, see Appendix B, Appellant's Brief, pgs. 75 to 78. The population figures for the tables set forth hereinabove are found in the D.R.I. II, 1-4.

The phrase "perpetual veto", meaning we suppose that the rural can veto legislation desirable to the urban, has an apparent attraction to Appellants. The phrase is employed throughout their brief. It is an argument, no matter how high sounding, without foundation. Nothing more need be added to that shown above to establish, in fact, there is no veto.

Any argument of "perpetuity" is of equal speciousness. Article V, Section 1, Colorado Constitution, reserves unto the people the power of the initiative and referendum. There is no point in extended argument as to the practicabilities of the initiative or the ease of its accomplishment. No better example of the facility of the initiative than Amendment 7 itself exists.

The want of equity presented herein of itself calls for dismissal of the cause. In the view expressed by Justice Clark in *Baker*, 369 U.S. at 258-259, the presence of the initiative in Colorado, and its use, puts an end to the matter.

As distinguished from the people of Tennessee, the people of Colorado have relief available to them without the courts and are possessed of "practical opportunities for exerting their political weight at the polls". The opportunity has been exercised, and in the exercise thereof the people by a plurality vote in every county, whether urban, suburban or rural dominated, chose Amendment 7 (305,700 to 172,725), and rejected specifically (311,749 to 149,822) a *per capita* method of apportioning the entire General Assembly. Their vote according to Governor Johnson, whose knowledge of Colorado, its people and their politics is not and probably never has been equalled,

was the result of being fully informed and intensely interested. See notes 31, 32, pages 930-931, 219 F. Supp.

Pertinent to this question is the extended comment of the court below,

> "The initiative gives the people of a state no power to adopt a constitutional amendment which violates the Federal Constitution. Amendment No. 7 is not valid just because the people voted for it. If the republican form of government principle is not a useable standard because it poses political rather than judicial questions, the observation is still pertinent that Amendment No. 7 does not offend such principle. If the true test is the denial of equal right to due process, we face the traditional and recognized criteria of equal protection. These are arbitrariness, discrimination, and lack of rationality. The actions of the electorate are material to the application of the criteria. The contention that the voters have discriminated against themselves appalls rather than convinces. Difficult as it may be at times to understand mass behavior of human beings, a proper recognition of the judicial function precludes a court from holding that the free choice of the voters between two conflicting theories of apportionment is irrational or the result arbitrary.
>
> The electorate of every county from which the plaintiffs come preferred Amendment No. 7. In the circumstances it is difficult to comprehend how the plaintiffs can sue to vindicate a public right. At the most they present a political issue which they lost. On the questions before us we shall not substitute any views which we may have for the decision of the elec-

torate. In Ferguson, Attorney General of Kansas, v. Skrupa, 372 U.S. 726, 731, 83 S. Ct. 1028, 1031, 10 L. Ed. 2d 93, the Supreme Court said that it refused to sit as a 'super-legislature to weigh the wisdom of legislation.' Similarly, we decline to act as a super-electorate to weigh the rationality of a method of legislative apportionment adopted by a decisive vote of the people.

We believe that no constitutional question arises as to the actual, substantive nature of apportionment if the popular will has expressed itself. In Baker v. Carr the situation was such that an adequate expression of the popular vote was impossible. In Colorado the liberal provisions for initiation of constitutional amendments permit the people to act—and they have done so. If they become dissatisfied with what they have done, a workable method of change is available. The people are free, within the framework of the Federal Constitution, to establish the governmental forms which they desire and when they have acted the courts should not enter the political wars to determine the rationality of such action." (219 F. Supp. at 932,933).

This we believe in any event lays to rest the argument of perpetuity.

So also should a word intervene upon the inference, if not direct assertion, that the history of Colorado is one disclosing, for ulterior or other purpose, inactivity in the field of apportionment. What is made patently clear by the testimony of Dean Rogers and the exhibits reflecting the apportionments since statehood is that there has been

unusual activity in the field. (Appendix, pg. 64-113; Exhibits E, pg. 213).

Our conception of the function of this Court is to consider the issue before it on the facts presently existing and before it. Nevertheless, a dissertation on discrimination in perpetuity is patently counterfeit. There is no discrimination. And our present form of legitimate state government in the legislative branch lasts only until the people desire to supplant it with another legitimate form.

Third: The apportionment plan of Amendment 7 treats alike those similar in fact.

The third and remaining test of Equal Protection is clearly met by Amendment 7. Those similarly situate, i.e. the rural areas, their peoples and their interests are treated alike, and the urban, metropolitan areas, their people and their interests are treated alike. In other words, there is an absence of "crazy-quilt" and a presence of continuing policy.

Again the division of the state into economic regions must be considered. There are three basically rural or sparsely populated areas: the western, the south central and the eastern. The Denver Research study points up the unifying similarities of these regions and why geographically, sociologically, and economically each are different from the other. (See D.R.I. Part I, pages 1-13).

Appendix C to the decision below, 219 F. Supp. 935-937, serves to clearly illustrate that no rural area has been discriminated against by any other rural area. What is shown there is that in the Western Region there are 8 senators representing 227,841 people, or 28,840 per sen-

ator. In the Eastern Region there are 5 senators representing 142,033 people, or 28,407 per senator. And in the South Central Region there are 3 senators representing 66,554, or 22,185 per senator.

The East Slope Region, i.e., the area of metropolitan population, is likewise within itself without any undue preference or discrimination.

The illustrative tabla is also included within Appendix C below. It is here reprinted.

Dist.	Co.	Sq. Mi.	Population	Senators	Population Per Senator
1-8	Denver	73	493,887	8	61,736
9-10	Pueblo	2,414	118,707	2	59,353
11-12	El Paso	2,159	143,742	2	71,871
13-14	Boulder	758	74,254	2	37,127
15-16	Weld	4,033	72,344	2	36,172
21-22	Jefferson	791	127,520	2	63,760
26	Larimer	2,640	53,343	1	53,343
19-20	Arapahoe	815	113,426	2	56,713
17-18	Adams	1,250	120,296	2	60,148
		14,933	1,317,519	23	57,283

The mean is shown as 57,283. The counties of Denver, Pueblo, Jefferson, Larimer, Arapahoe and Adams are clearly and closely aligned with this mean. In considering these counties alone, the mean or average, per senator, is 59,175.

What deviations are presented in the other counties permit of obvious explanation.

Boulder and Weld counties in 1960 had a population of 74,254 and 72,344 respectively. Had Boulder been left

with one senator, the situation antedating Amendment 7, and were one of two senators by whom Weld County had been represented for years taken from it, each would have exceeded the mean of the remaining Eastern Slope group considerably. The choice was made to leave Weld as it had been historically and add one to Boulder, consideration unquestionably being given to the present factor of Boulder's growth rate.

El Paso county population on the other hand exceeds to an extent the mean average per senator, but not of sufficient proportions to allow an addition of a senator to increase its representation to 3, and particularly so in that, as pointed up in the Denver Research study (I-45), there were approximately 28,000 uniformed military personnel in the immediate Colorado Springs area shortly after 1960.

It must also be observed with respect to the East Slope region that there are no counties, i.e., Senatorial Districts, which could be joined with any other. The allotment of additional senators to the region would disrupt the balance with the remaining areas of the state, and an indiscriminate increase in the number of senators throughout Colorado, in an effort to achieve the same balance through different means, would be in destruction of the ratio of House to Senate, i.e., the termination of a policy enunciated at statehood and adhered to since.

It must therefore be concluded that the Colorado plan of apportionment cannot in any particular be described as "crazy-quilt".

The standards of Equal Protection having been met there is no justification for the overwhelming mandate of

the people of Colorado to be turned out and the philosophy of others whether reasoned or unreasoned to in turn be supplanted.

The Fourteenth Amendment does not require this or any other Court to choose between alternatives.

CONCLUSION

It is respectfully submitted in conclusion that the judgment of the court below should in all respects be affirmed and the complaints in each case dismissed.

The people of Colorado by an overwhelming majority throughout the state have chosen that form of legislative government by which they are to be represented. The choice was made intelligently and upon full information. That form of legislative government which the Appellants would have the Court impose upon the people was specifically rejected by them, again by an overwhelming majority throughout.

The plan of apportionment which the people did choose insures them all a voice in the legislative department. It leaves with the majority the voice of the majority. When tested by the familiar and well defined standards of Equal Protection of the Laws, as this Court has said it must, its validity is not open to challenge, and we ask this Court to so declare.

Respectfully submitted,

DUKE W. DUNBAR
Attorney General
State of Colorado

ANTHONY F. ZARLENGO
Special Assist. Atty. General
State of Colorado

Attorneys for Appellee-Defendants

Appendix A

DISTINGUISHING CHARACTERISTICS OF SENATORIAL DISTRICTS EACH FROM THE OTHER AND UNIFYING CHARACTERISTICS INHERING IN MULTIPLE COUNTY DISTRICTS. TAKEN FROM DENVER RESEARCH INSTITUTE STUDY EXHIBIT "D".

WESTERN REGION

District No. and County	Distinguishing Characteristics	Unifying Similarities
29. Moffat Routt Rio Blanco Jackson Grand	1. Accessibility and state lines define boundaries 2. Largest district in Colorado over 8.8 million acres 3. Economy resource-oriented (minerals, agriculture, lumber, tourism, water)	1. U.S. Highway 40 is main transportation link 2. Resources important to all counties
37. Garfield Eagle Pitkin Summit Lake	1. Accessibility limited; mountain ranges define east and south boundaries 2. Economy resource-oriented. (minerals, agriculture, tourism, water) 3. 80% of land owned by governments	1. U.S. Highway 6 is main transportation link 2. All counties gained population in past decade 3. Counties uniformly have much government owned land

WESTERN REGION—Continued.

District No. and County	Distinguishing Characteristics	Unifying Similarities
32. Mesa	1. Trade and service center for much of western region 2. Steady population growth since 1900; up 30% in last decade.	
27. Delta Gunnison Hinsdale	1. Accessibility limited on 3 sides by high mountain ranges 2. Resource-oriented economy 3. Population declining	1. All 3 counties in Gunnison River Basin 2. All 3 counties lost population in last decade
33. Montrose Ouray San Miguel Dolores	1. Mining (particularly uranium) important in terms of both output ($24.7 million) and employment (18.3%) 2. Population gained 14% 3. Over 60% of land owned by government	1. Agriculture important source of employment in all counties 2. Area mountainous, all counties have at least 30% ownership of land by governments
35. San Juan Montezuma La Plata Archuletta	1. Accessibility and San Juan River Basin define area well 2. Economy resource-oriented (agriculture, mining, and tourism)	1. Durango-Cortez and transportation network act as unifying influence

WESTERN REGION—Continued.

District No. and County	Distinguishing Characteristics	Unifying Similarities
	3. Population gained 25% between 1950 and 1960	
24. Gilpin Clear Creek Park Chaffee Teller Douglas	1. East-of-Divide mountainous counties 2. Sparse population, rural 3. Economy resource-oriented (Agriculture, mining and tourism)	1. Counties similar in socio-economic characteristics (age, education, income)
25. Fremont and Custer	1. Topography, accessibility define boundaries on North, South, and East 2. Economic base more diverse than others in Western Region 3. Population older, lower income, and poorly educated	1. Fremont and Custer formed one county 2. U.S. Highway 50 is main transportation link

EASTERN REGION

District No. and County	Distinguishing Characteristics	Unifying Similarities
28. Logan Sedgwick Phillips	1. Agriculture dominant source of employment 2. Population predominantly rural; older	1. Agriculture major basic industry in all three counties 2. Transportation network unifying influence
36. Morgan Washington Yuma	1. Agriculture dominant source of employment; over 90% of land in private farms 2. Population predominantly rural; older 3. Oil production over $50 million	1. Agriculture dominant source of employment and major land use in all three counties 2. Transportation network unifying influence
34. Elbert Lincoln Kit Carson Cheyenne Kiowa	1. Agriculture dominant source of employment and land use 3. District 2nd largest; covers over 6 million acres	1. All counties dominated by agriculture 2. Population characteristics similar—all lost people between 1950-1960 3. Transportation network unifying influence

EASTERN REGION—Continued.

District No. and County	Distinguishing Characteristics	Unifying Similarities
38. Crowley Otero	1. Agriculture major source of employment, but economy more diversified than other eastern districts 2. La Junta major city in district; 45% of population urbanized 3. District in Arkansas River Basin, and should benefit from additions to water supply in future	1. Both counties lost population in last decade 2. Agriculture major basic industry in both counties 3. Transportation network unifying influence
39. Bent Prowers Baca	1. Agriculture major source of employment 2. Population predominantly rural, older, and declining 3. District in Arkansas River Basin	1. All counties lost population in last decade 2. Agriculture major industry in all three counties 3. Transportation network unifying influence

SOUTH CENTRAL REGION

District No. and County	Distinguishing Characteristics	Unifying Similarities
31. Saguache Mineral Rio Grande Conejos	1. Accessibility limited except to east; all in Rio Grande River Basin 2. Agriculture dominant source of employment; potatoes major crop 3. Population declining rapidly, economically depressed area	1. All counties lost population in past decade; all have low incomes and are economically depressed 2. Spanish influence important in all counties
30. Alamosa Costilla Huerfano	1. Agriculture dominant basic industry 2. 41 percent have Spanish surname 3. Population declining, economically depressed area	1. All counties lost population in past decade; all classed as areas of substantial and persistent unemployment 2. Spanish influence important in all counties
23. Las Animas	1. Greatest population loss in past decade of any Colorado county 2. Mining and agriculture major sources of employment; both declining 3. Economically depressed area	

EAST SLOPE REGION

District No.	County	Distinguishing Characteristics
1-8	Denver	1. Population, trade and service center of Colorado and mountain region
9-10	Pueblo	1. Steel-based economy
11-12	El Paso	1. Dramatic population growth in past decade 2. Military and tourism are major basic industries
13-14	Boulder	1. Educational services, trade, and services are important sources of employment
21-22	Jefferson	1. Rapid growth as residential area 2. Family incomes highest in state
19-20	Adams	1. Rapid growth (highest rate of increase in state) as residential area 2. Younger, lower income residents
17-18	Arapahoe	1. Rapid growth as above average residential area 2. Incomes and educational levels among highest in state
26	Larimer	1. Diversified, healthy economy 2. Population concentrated in southeast corner
15-16	Weld	1. Leading agricultural county in Colorado 2. Population concentrated in southwest corner